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Scholarship as Dialogue? ICL, TWAIL and the Politics of Methodology*

Abstract: *Scholars of International Criminal Law (ICL) and Third World Approaches to International Law (TWAIL) rarely speak to each other and part of the reason for this is often divergent approaches to methodology. Thus this article begins with an exploration of the ways in which international lawyers (mis)conceive methodology in their work so as to account for patterns of scholarly dialogue as well as silence. I argue in this article that ICL scholars can learn from TWAIL experiences with methodology, especially as the ICL field leaves the 'honeymoon' phase and enters a more 'mature' period that calls for greater reflexivity by practitioners and scholars alike. Understanding methodology with and against TWAIL is one way of contributing to ICL's scholarly evolution.*

1. Introduction

Scholars of International Criminal Law (ICL) and Third World Approaches to International Law (TWAIL)¹ rarely speak to each other in spite of both having gained momentum in the heyday of post-Cold War multilateralism, judicial institution-building and a renewed faith in the possibility of social transformation through law. There are many reasons for this lack of engagement, ranging from the scholarly histories of ICL and TWAIL, their animating purpose and attendant professional identities, along with their respective status within the international law academy and field of practice. ICL and TWAIL also differ as although both are scholarly movements, only ICL can be understood more broadly as a proper set of norms, a

* Thanks to Jerusa Ali, Sarath Burgis-Kasthala, Hilary Charlesworth, Rachel Hughes, Lia Kent, Asad Kiyani, Heidi Matthews, John Reynolds, Sujith Xavier and the reviewer/s for their comments and to Sascha Kouvelis for research assistance. This research was funded by the Australian Research Council.

¹ Some exceptions from TWAIL scholars writing in ICL include C. C. Jalloh, 'Regionalizing International Criminal Law?', 9 *International Criminal Law Review* (2009) 445; V. Nesiha, 'From Berlin to Bonn to Baghdad: A Space for Infinite Justice', 17 *Harvard Human Rights Journal* (2004) 75; O. C. Okafor and U. Ngwaba, 'The International Criminal Court as a "Transitional Justice" Mechanism in Africa: Some Critical Reflections', 9 *International Journal of Transitional Justice* (2015) 90; J. Reynolds and M. Kearney, 'Palestine and the Politics of International Criminal Justice', in W. Schabas et al. (eds), *The Ashgate Research Companion to International Criminal Law: Critical Perspectives* (Farnham: Ashgate, 2013) 407-433; and S. Xavier, 'Looking for "Justice" in all the Wrong Places: Creating an International or Hybrid Criminal Tribunal for Sri Lanka?', A. Amarasingam and D. Bass (eds), *Post-War Sri Lanka: Problems and Prospects* (Hurst/Oxford University Press 2015, forthcoming) available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2557478 (last visited 24/07/2015).

branch of public international law generating an institutionalised movement within international politics. For ICL, its rise is an indisputable fact: new specialised journals, general publications, conferences as well as its discursive uptake in a number of scholarly, practice-oriented and policy spheres. It would seem then that riding this wave of ICL-success requires no changes in course or technique whether through dialogue with a TWAIL sensibility or any other form of critique.² Yet once we probe underlying ICL currents, the journey no longer seems so effortless, indicating instead that a masterful form of freestyle is required to navigate ICL's contradictory pulls of law and politics and of humility and domination.

In this article, I explore general questions of methodology in international law before focussing specifically on ICL methodology. I seek to enrich ICL scholarship by placing ICL in dialogue with TWAIL approaches to methodology. Typically, mainstream ICL scholarship overlooks questions of methodology.³ These scholarly silences are partially compensated by an expanding body of work on the interdisciplinary fringes of ICL including anthropology, criminology and sociology discussed below. These disciplines also inform TWAIL methodological debates, which are far more common than their ICL counterparts. Yet although TWAIL scholarship is more comfortable raising questions about methodology, it is not possible to identify a shared methodology. At best, we can speak of a TWAIL *sensibility*. I argue in this article that ICL scholars can draw from TWAIL experiences, especially as the ICL field leaves the 'honeymoon' phase and enters a more 'mature' period that calls for greater reflexivity by practitioners and scholars alike.⁴ Understanding methodology with and against TWAIL is one way of contributing to ICL's scholarly evolution.

² William Schabas also deploys a 'riding the wave' metaphor in W. A. Schabas, 'The Banality of International Justice', 11 *Journal of International Criminal Justice* (2013) 545-551. But see Vasiliev who argues that in the area of practice, ICL is already a 'shrinking field' with large numbers of experts on the job market facing a 'career dead end'. This is not the case on academia, where 'ICL shows no signs of recession.' S. Vasiliev, 'On Trajectories and Destinations of International Criminal Law Scholarship' 28 *Leiden Journal of International Law* (2015) 701, at 705, 706.

³ For example, see the symposiums on ICL and socio-legal methodologies in the *Leiden Journal of International Law* (2013) 26 (4), at 933-1023; and (2014) 27 (1), at 189-260.

⁴ D. Luban, 'After the Honeymoon: Reflections on the Current State of International Criminal Justice', 11 *Journal of International Criminal Justice* (2013) 505; and M. Drumbl, 'Collective Violence and Individual Punishment: The Criminality of Mass Atrocity', 99 *Northwestern University Law Review* (2005) 551, at 607-608.

This article begins by broadly exploring the nature of methodology in international legal scholarship. It then moves on to map out the nature and purpose of ICL scholarship and links this with both its stated and unstated dominant methodologies. I then consider how TWAIL scholars understand methodology. Equipped with these accounts about the relationship between actors (scholars) and processes (methodology), we can then assess their outcomes through one of their shared aims of ending violence through law. Debates will persist as to whether the law can subvert various forms of violence,⁵ but at the very least, an honest dialogue about the methodological strengths and weaknesses of ICL and TWAIL is a start.

2. Linking Methodologies to Scholarly Purpose: Reflexivity in the Field of International Law

International law is a scholarly field or vocation that contains within it a set of often unspoken background rules that inform the way international lawyers see themselves as well as their site of academic production. According to Pierre Bourdieu, people learn how to operate in social fields not as a matter of choice, but by being born into them and then undergoing a slow process of acculturation that occurs before any conscious decision to enter or exit the field.⁶ In contrast to social fields, international lawyers *choose* to enter the juridical field. Yet, once they commit to the profession,⁷ international lawyers are shaped by and shape the specific logics of international legal forms.⁸ Thus, successful international lawyers do not simply follow positive norms of scholarly conduct. Through the gradual acculturation to the international legal *habitus*, they become competent in speaking international legal discourse fluently – meaning that they do not need to consult handbooks of grammar and lexicography to craft

⁵ We can understand the law as constitutive of violence: R. Cover, ‘Violence and the Word’ 95 *Yale Law Journal* (1986) 1601-1629.

⁶ P. Bourdieu, *The Logic of Practice* (Stanford University Press, 1990 [1980], trans. R. Nice), at 67.

⁷ On commitment, see M. Koskeniemi, *The Politics of International Law* (Hart Publishing, 2011), at ch 11.

⁸ P. Bourdieu, ‘The Force of Law: Toward a Sociology of the Juridical Field’, 38 *Hastings Law Journal* (1987) 814. For a consideration of Bourdieu’s theory and international law, see U. Özsü, ‘The Question of Form: Methodological Notes on Dialectics and International Law’, 23 *Leiden Journal of International Law* (2010) 687, at 698 ff. For a field-based analysis of International Criminal Justice, see P. Dixon and C. Tenove, ‘International Criminal Justice as a Transnational Field: Rules, Authority and Victims’ 7 *International Journal of Transitional Justice* (2013) 393-412.

successful arguments.⁹ For Martti Koskeniemi, the ‘final arbiter of what works is nothing other than the *context* [or field] (academic or professional) in which one argues.’¹⁰ This process of becoming an international lawyer then is about the formation of professional identities which contain within them a normative commitment to the field and its purpose as well as a strong sense of what types of professional behaviour and speech underpins the field.¹¹

History also informs the development of scholarly fields as a widely accepted narrative about a field’s origins will provide not only a sense of shared experiences, but a way of thinking about directions for the future.¹² We can understand ICL as a specialised *regime*¹³ within the expanding wider ‘terrain’ of international law which is ‘made up of towns and villages with interconnecting paths and highways.’¹⁴ Although ICL practice and scholarship does possess particular logics, these are not so pronounced as to constitute a radical break with (or fragmentation of) that international law tradition.¹⁵

Academic fields will invariably foster and support certain paradigms and international law is profoundly shaped by liberalism as a paradigm and a theory. *Paradigms* comprise a shared way of positing knowledge: epistemology, ontology and axiology. From a paradigm then flows particular *theoretical lenses* such as social science or feminist theories. This theoretical basis will shape ways of understanding the process of inquiry itself or *methodology*, thus framing the ways in which research is conducted and the questions that are asked. From this point, there are a variety of ways or *methods* to answer a given question such as interviews, discourse analysis and

⁹ M. Koskeniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press, 2005), at 566-573.

¹⁰ Emphasis added, M. Koskeniemi, ‘Letter to the Editors of the Symposium’, 93 *American Journal of International Law* (1999) 351, at 356.

¹¹ G. Simpson, ‘Linear Law: The History of International Criminal Law’, in C. Schwöbel (ed.), *Critical Approaches to International Criminal Law: An Introduction* (Routledge, 2014) 159-179, at 173.

¹² Generally see M. Koskeniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (Cambridge University Press, 2002).

¹³ M. Koskeniemi, ‘The Fate of Public International Law: Between Technique and Politics’, 70 *Modern Law Review* (2007) 1-30.

¹⁴ Oscar Schachter quoted in D. J. Bederman, *The Spirit of International Law* (University of Georgia Press, 2002), at 106.

¹⁵ See V. Nerlich, ‘Daring Diversity – Why there is Nothing Wrong with “Fragmentation” in International Criminal Procedures’, 26 *Leiden Journal of International Law* (2013) 777-781. Scholars disagree over the question of international law’s unity or fragmentation. For an overview, see M. Prost, *The Concept of Unity in Public International Law* (Hart Publishing, 2012), at 8-14.

the compiling of statistical data.¹⁶ Typically, specific paradigms and theoretical lenses will frame the methodology and choice of methods used to research a particular issue. Within a given academic field, a dominant paradigm – such as liberalism – will inform (often unconscious) choices about methodology with inevitable political ramifications.

Research across fields – interdisciplinarity – produces particular tensions. Yves Dezalay and Mikael Madsen suggest examining actors who can operate in multiple fields as a way of understanding the fluid boundaries of a given field's logic.¹⁷ For example, a sociology of the ICL field would be alive to the ways in which judges, scholars and activists circulate within and beyond international criminal tribunals (ICTs) as well as the extent to which non-ICL-expert international lawyers and laypeople can influence the discourse and practice of ICL.¹⁸ How is expertise produced and sustained within ICL scholarship and practice? What are the barriers to entry and what are the stakes in disrupting prevailing ICL conduct as scholar, practitioner or activist? Given the connection between disciplines and their attendant worldviews, *specific* academic sites will tend to nurture *certain* types of inquiry. For example, in their work on the contribution that victim surveys conducted through public health research can bring to mounting ICL prosecutions, Jamie Rowen and John Hagan concede that such research 'may ask different questions' from those asked by international criminal lawyers.¹⁹ Thus, perhaps the most valuable result of reflecting

¹⁶ J. W. Creswell and V. L. Plano Clark, *Designing and Conducting Mixed Methods Research* (2nd ed., Sage, 2011), at 39 and generally ch 2.

¹⁷ Y. Dezalay and M. R. Madsen, 'The Force of Law and Lawyers: Pierre Bourdieu and the Reflexive Sociology of Law', 8 *Annual Review of Law and Social Science* (2012) 433, at 441.

¹⁸ For sociological accounts of the place of lawyers within the 'conflict field', see S. Dezalay, 'Lawyering war or talking peace? On militant usages of the law in the resolution of internal armed conflicts: A case study of international alert', in Y. Dezalay and B. G. Garth (eds), *Lawyers and the Construction of Transnational Justice* (Routledge, 2012) 60-83; and R. Levi and J. Hagan, 'Lawyers, humanitarian emergencies and the politics of large numbers', in Y. Dezalay and B. G. Garth (eds), *Lawyers and the Construction of Transnational Justice* (Routledge, 2012) 13-47.

¹⁹ J. Rowen and J. Hagan, 'Using Social Science to Frame International Crimes', 10 *Journal of International Law and International Relations* (2014) 92, at 100. Also for a sociology of human rights, war crimes and humanitarian emergencies, see J. Hagan et al., 'The Science of Human Rights War Crimes and Humanitarian Emergencies', 32 *Annual Review of Sociology* (2006) 329. For some examples of socio-legal studies on ICL professional norms published in an international law journal, see R. Byrne, 'Drawing the Missing Map: What Socio-legal Research Can Offer to International Criminal Trial Practice', 26 *Leiden Journal of International Law* (2013) 991; and J. Jackson and Y. M'Boge, 'The Effect of Legal Culture on the Development of International Evidentiary Practice: From the "Robing Room" to the "Melting Pot"', 16 *Leiden Journal of International Law* (2013) 947-970.

on ICL methodologies is to interrogate the way ICL scholarship frames the process of interrogation itself whether in the courtroom or through scholarly debates.

Perhaps the most sustained consideration of methodology in international law appeared as a special issue of the *American Journal of International Law (AJIL)* in 1999. Two aspects of the symposium are noteworthy. First, is the editorial approach to the link between methodology and a scholarly discipline. In their final observations as editors for the symposium, Anne-Marie Slaughter and Steven Ratner suggest that ‘the practice of a particular method is a matter of choice ... and that is a choice that should be as self-conscious as possible.’²⁰ Of course, the process of scholarly inquiry can and must entail degrees of self-reflexivity, but ‘choices’ about methods will invariably be shaped by professional identities and prevailing paradigms, as alluded to above. As Koskeniemi remarked in his letter to the editors of the symposium,

The difficulty lies in the assumption that there is some overarching standpoint, some nonmethodological method, a nonpolitical academic standard that allows that method or politics to be discussed from the outside of particular methodological or political controversies. Just as political liberalism assumes itself to be a nonpolitical, neutral framework within which the various parties can compete for influence in society, so your question – your *initial* question – assumed the existence or accessibility of some perspective or language that would not itself be vulnerable to the objections engendered by the academic styles ... But there is no such neutral ground: like the shopping mall, the symposium is a mechanism of inclusion and exclusion, of blindness and insight.²¹

Of particular note for this article was the initial exclusion of TWAIL approaches as ‘distinctive ways of thinking about what international law is and should be.’²² Two TWAIL authors were invited to contribute to the symposium *after* its publication. The resulting article first appeared in the *Chinese Journal of International Law*.²³ A year later, it was published in an edited book version of the *AJIL* symposium.²⁴ Such an

²⁰ A-M. Slaughter and S. R. Ratner, ‘The Method is the Message’, 93 *American Journal of International Law* (1999) 410 at 423.

²¹ Koskeniemi, *supra* note 10, at 352.

²² A. Anghie and B. S. Chimni, ‘Third World Approaches to International Law and Individual Responsibility in Internal Conflicts’, 2 *Chinese Journal Of International Law* (2003) 77-103, at 77.

²³ *Ibid.*

²⁴ S. R. Ratner and A-M. Slaughter (eds), *The Methods of International Law* (American Society of International Law, 2004), at 185-210.

episode underscores one of the central points of this article – that all scholars of international (criminal) law need to reflect on the politics of methodology.

3. Mapping (often hidden) ICL methodologies

The scholarly field of ICL comprises an impressively expansive academic enterprise of university courses and publications that relies on and supports ICL practice, especially as embodied within ICTs. As suggested above, fields and their actors co-constitute a sense of purpose as well as dominant research paradigms and resulting methodologies. Although ICL scholarship tends to be open about its purpose, it is far less engaged with thinking about questions of theory and methodology. When acknowledged, international criminal lawyers tend to characterise methodology in classic doctrinal terms through analyses that develop criminal procedure or methods comprising discourse analyses of ICT jurisprudence.²⁵ More detailed discussions about *how* scholars perform ICL are rare and systematic studies rarer still.²⁶

There are many reasons for these oversights. International lawyers are far less concerned with questions of methodology than a number of other social scientists. Influences from history and the social sciences have pushed some legal scholars to adopt explicit discussions about their methodologies, but this remains the exception rather than the norm, whether for ICL or international law more broadly.²⁷ Notwithstanding robust voices of dissent and criticism,²⁸ ICL scholarship is sustained by a particularly robust faith in the field's success²⁹ which tends to override recognition of the need for systematic and explicit debates on methodology. If 'setbacks' are acknowledged,³⁰ a range of responses centring on a lack of enforcement

²⁵ For example, see I. Bantekas, 'Reflections on Some Sources and Methods of International Criminal and Humanitarian Law', 6 *International Criminal Law Review* (2006)121.

²⁶ Cf. E. Bikundo, *International Criminal Law: Using or Abusing Legality?* (Ashgate, 2014).

²⁷ Some exceptions include: a symposium on method in international law: 93 *American Journal of International Law* (1999) 291-423; A. Orford, 'In Praise of Description', 25 *Leiden Journal of International Law* (2012) 609-625; A. Orford, 'On international legal method', 1 *London Review of International Law* (2013) 166-197; and G. Shaffer and T. Ginsburg, 'The Empirical Turn in International Legal Scholarship', 106 *American Journal of International Law* (2012) 1-46.

²⁸ For example, see M. J. Osiel, 'The Demise of International Criminal Law', *Humanity Journal Blog*, 10 June 2014, <http://humanityjournal.org/blog/the-demise-of-international-criminal-law>.

²⁹ S. M. H. Nouwen, 'Justifying Justice', in J. Crawford and M. Koskeniemi (eds), *The Cambridge Companion to International Law* (Cambridge University Press, 2012) 327-351, at 328.

³⁰ Schabas, *supra* note 2, at 545-546.

and suggestions for improvement³¹ ensure that the progress narrative prevails.³² Finally, the dominant paradigm informing ICL scholarship is a positivist, liberal one which favours doctrinal writing or at most, discourse analysis about the normative underpinnings of the ICL project. Empirical research, for example as found in the social sciences, is marginal for most legal research because normative analysis tends to displace explanation, prediction or analyses of human behaviour.³³ ‘The normative character of the law also means that the validity of doctrinal research must inevitably rest upon developing consensus within the scholastic community, rather than on an appeal to any external reality.’³⁴

In the following section, I first explore the purpose of ICL scholarship and the implications this has on under-theorisation as well as methodological naïveté. I then map the various extant methodologies to tease out how particular methodologies – whether spoken or unspoken – will tend to reinforce or disrupt ICL’s *raison d’être*.

Despite its narrowly technical nature and specific doctrinal focus, the project of ICL is ambitious in scope: the realisation of global justice itself where justice is understood in opposition to politics.³⁵ In the words of David Luban,

Speaking law to power...is the major point of ICJ [international criminal justice]. Its mode of functioning is expressive, and its aim is *norm projection*, the dissemination through trials, punishments and jurisprudence of a set of norms very different from the Machiavellian brutality of the past. The radical goal of ICJ is a moral transformation of how ordinary men and women regard political violence against civilians.³⁶

³¹ Such sentiments are encapsulated by Robert Cryer’s motivations for doing ICL research: ‘My critique of the international criminal law regime is born not of a desire to undermine the regime, but to ask what it could have been, and might still be.’ R. Cryer, *Prosecuting International Crimes* (Cambridge University Press, 2005), at 6.

³² T. Skouteris, *The Notion of Progress in International Law Discourse* (T. M. C. Asser Press, 2010); for example, see P. Akhavan, ‘The Rise, and Fall, and Rise, of International Criminal Justice’, 11 *Journal of International Criminal Justice* (2013) 527; and M. Damaška, ‘The International Criminal Court Between Aspiration and Achievement’, 14 *UCLA Journal of International Law and Foreign Affairs* (2009) 19-35.

³³ P. Chynoweth, ‘Legal Research’, in A. Knight and L. Ruddock (eds), *Advanced Research Methods in the Built Environment* (Wiley-Blackwell, 2008) 28-38, at 30.

³⁴ *Ibid.*

³⁵ S. Nouwen and W. Werner, ‘Doing Justice to the Political: The International Criminal Court in Uganda and Sudan’, 21 *European Journal of International Law* (2010) 941.

³⁶ Emphasis in original, Luban, *supra* note 4, at 509.

Although all areas of international legal scholarship can be understood as striving for ‘global justice’ in some way, ICL’s focus on the most heinous of acts (determined as war crimes, genocide, crimes against humanity and aggression) means that it is hard to discount, especially if we are presented with the ‘choice’ between ‘global justice’ or its denial. Although ‘global justice’ itself is rarely theorised³⁷, the proliferation and amplification of ICL accounts tends to crowd out other voices and lived experiences of ‘justice’.³⁸

This focus on ‘global justice’ ultimately rests not on evidence-based appraisals about the effectiveness of ICJ,³⁹ but instead on a deeply held faith by ICL practitioners and scholars in the transformative potential of law.⁴⁰ Thus, often there is no distinction between scholarship *on* ICL and ICL scholarship *in support of* the field itself.⁴¹ Such an understanding of the ICL scholar as a tireless, committed advocate for ‘global justice’ is fuelled by a sense of urgency where stories of new atrocities are readily accessible: ICL can be used simultaneously to punish individuals while dissuading potential perpetrators from committing future crimes.⁴² This sense of urgency is only heightened if ICL mechanisms are understood as removed from and yet dependent on politics for their success:⁴³ here the ICL advocate must persuade the powerful of the legitimacy of their global justice quest as an apolitical project for saving humanity no less.⁴⁴ Thus, the promise of ICL is radically overambitious in the way it seeks to realise (a particularised) ‘global justice’ for humanity, while adopting a radically narrow practice – typically international trials of individuals – to achieve such a goal. Although ICL practice can be seen as highly selective, such criticisms can be countered through failings in *implementation* rather than the *goal* of ICL per se.

³⁷ F. Mégret, ‘What Sort of Global Justice is “International Criminal Justice”?’ 13 *Journal of International Criminal Justice* (2015) 77.

³⁸ S. M. H. Nouwen, “‘As you set out for Ithaka’”, practical, epistemological, ethical, and existential’, 27(1) *Leiden Journal of International Law* (2014) 227 at 255; and K. Clarke, *Fictions of Justice: The International Criminal Court and the Challenge of Legal Pluralism in Sub-Saharan Africa* (Cambridge University Press, 2009).

³⁹ *Ibid* 229.

⁴⁰ D. S. Koller, ‘The Faith of the International Criminal Lawyer’, 40 *New York University Journal of International Law and Politics* (2008) 1019; and Drumbl, *supra* note 4, at 546.

⁴¹ Nouwen, *As you set out for Ithaka*, *supra* note 38, at 229; and Byrne, *supra* note 19, at 1000.

⁴² For example, J. F. Alexander, ‘The International Criminal Court and the Prevention of Atrocities: Predicting the Court’s Impact’, 54 *Villanova Law Review* (2009) 1.

⁴³ See K. A. Rodman, ‘Justice as a Dialogue Between Law and Politics’, 12 *Journal of International Criminal Justice* (2014) 437.

⁴⁴ For example, see Luban, *supra* note 4, at 509. On the relationship between the international lawyer and power, see A. Orford, ‘Embodying Internationalism: The Making of International Lawyers’, 19 *Australian Year Book of International Law* (1998) 1-34.

Making concessions about external failings of ICJ also helps to shift attention away from critique of internal flaws within ICL norms and scholarship.

First, it is useful to reflect on the way that theory is understood within mainstream ICL writings. Much of the time, theory is simply not recognised as a valid aspect of ICL research.⁴⁵ According to Frédéric Mégret,

the theory of international criminal justice is often understood as the theory of its institutions (primarily the tribunals) and its legal practices, rather than something that needs to be specifically understood in terms of justice. In fact, it might be argued that international criminal justice has less of a theory of its global justice than a theory of its fairness to, notably, defendants.⁴⁶

When theory does appear, it is often in instrumentalist registers, whereby typically domestic liberal theories are used for international analogies. Writers engaging in critical appraisals of domestic liberal analogies tend to engage in discourse analysis about how ICL scholarship and jurisprudence has failed to tease out tensions within (domestic) liberal theory.⁴⁷ In particular, they point out the ways in which (ordinary) domestic crimes are framed as social deviance whereas (extraordinary) international crimes often occur in the context of social collapse. Whether acknowledged or not, liberalism remains the dominant paradigm within the ICL field and its influence is crucial in shaping (typically) narrow doctrinal analyses that are framed by positivist epistemologies and ontologies fixated on individual responsibility for various types of extreme, direct violence.

Aside from doctrinal accounts and a range of discourse analysis studies grounded in ICT jurisprudence, most ICL research using other methods tends to be inspired by non-legal disciplines or at the very least, is shaped by extra-discipline agendas and theories. Most ICL work contains no explicit statement on methodology⁴⁸ and when they do, it is far from systematic. This is surprising for a number of

⁴⁵ Cf. a symposium on ICL and philosophy: A. Matwijkiw, 'Introduction: On the Philosophy of International Criminal Law', 14 *International Criminal Law Review* (2014) 669.

⁴⁶ Mégret (2015), *supra* note 37, at 78.

⁴⁷ D. Robinson, 'The Identity Crisis of International Criminal Law', 21 *Leiden Journal of International Law* (2008) 925; D. Robinson, 'A Cosmopolitan Liberal Account of International Criminal Law', 26 *Leiden Journal of International Law* (2013) 127; and I. Tallgren, 'The Sense and Sensibility of International Criminal Law', 13 *European Journal of International Law* (2002) 561, at 565-568.

⁴⁸ An exception is A. Smeulers et al., 'The Selection of Situations by the ICC: An Empirically Based Evaluation of the OTP's Performance', 15 *International Criminal Law Review* (2015) 1.

commentators who have argued that ICL's central purpose of ending impunity and mass atrocity should and can be tested through examining practices both during trials as well as their fallout. For example, Rosemary Byrne argues that the rapid rise of the international criminal justice field makes it an ideal site for intersecting legal and social science approaches. In particular, she highlights a lack of empirical research on ICL trials despite being key sites for ICJ's legitimacy and legitimation.⁴⁹

Such calls for testing the extent to which ICL is an effective policy tool for prevention and punishment tend to focus on empirical analysis,⁵⁰ often grounded in criminological theory.⁵¹ Although most ICL scholars and criminologists do not engage with each other,⁵² when they do, the methodological emphasis is on the strengths and weaknesses of using *empirical* data to fill in gaps of ICL analysis.⁵³ Such an emphasis though on questions of proof that can validate the ICL field *ex post facto* fails to interrogate underlying ICL frameworks and assumptions, namely prevailing worldviews within the field. Empirical data here serves as a way of strengthening established liberal ICL approaches that focus on direct violence; questions about structural violence do not need to be raised.

Feminist approaches within ICL are most comfortable in stating theoretical, methodological and normative agendas.⁵⁴ As in the case of TWAIL scholars, feminist scholars regard their approach not simply as an intellectual endeavour, but as a political project for social change, where the production of ideas are placed in their political contexts. Feminist ICL scholars have therefore contributed to the development of ICL methodologies particularly through mapping the gendered nature

⁴⁹ Byrne, *supra* note 19, at 991-993. For a recent exception which uses quantitative and qualitative methods in assessing understandings of crimes against humanity, see L. Sadat, 'Crimes against Humanity in the Modern Age', 107 *American Journal of International Law* (2013) 334.

⁵⁰ For Van der Wilt, empirical methods are beyond the training of international criminal lawyers and thus are beyond the purview of the field: H. Van der Wilt, 'Universal Jurisdiction under Attack: An Assessment of African Misgivings towards International Criminal Justices as Administered by Western States', 9 *Journal of International Criminal Justice* (2011) 1043.

⁵¹ For example, see U. Ewald, "'Predictably Irrational' – International Sentencing and its Discourse against the Backdrop of Preliminary Empirical Findings on ICTY Sentencing Practices", 10 *International Criminal Law Review* (2010) 365.

⁵² Especially see P. Roberts and N. McMillan, 'For Criminology in International Criminal Justice', 1 *Journal of International Criminal Justice* (2003) 315; and D. L. Rothe and C. W. Mullins, 'Toward a Criminology of International Criminal Law: An Integrated Theory of International Criminal Violations', 33 *International Journal of Comparative and Applied Criminal Justice* (2009) 97.

⁵³ Drumbl, *supra* note 4. Rowen and Hagan, *supra* note 19.

⁵⁴ For example, D. Buss, 'Performing Legal Order: Some Feminist Thoughts on International Criminal Law', 11 *International Criminal Law Review* (2011) 409.

of ICL doctrines and discourse. According to Doris Buss, for feminists working in ICL, the ‘task was and is to ensure the ongoing visibility of the gendered nature of the harms women face in conflict, while maintaining recognition of the political, social and economic complexity of violence and conflict.’⁵⁵ Although feminist approaches on excavating silences and deconstructing discursive binaries are applicable to any aspect of ICL,⁵⁶ overt feminist engagement with ICL concentrates on sexual violence.⁵⁷ Significant ‘successes’ have resulted from these efforts,⁵⁸ but more self-reflexive feminist work within ICL has also pointed to the ‘unintended consequences’ of these efforts which have included a denial of women’s agency and the conflation of all harms as ones of ‘sex, not of violence or gender oppression.’⁵⁹ Thus, Karen Engle asks us to ‘reconsider whether increasing the number of convictions for sex crimes should be a central goal of international feminist advocacy.’⁶⁰ Such feminist-inspired reflection could resonate with any aspect of ICL scholarship to facilitate research on the purpose of the international criminal trial, yet to date, feminism’s influences within the ICL field have rarely extended beyond a focus on sexual violence.

Perhaps enjoying a more widespread presence than feminist scholars, but equally under-represented within mainstream ICL scholarship are those contributions of scholars committed to broad-based qualitative, interdisciplinary research. As this type of research is self-reflexive and often entails data collection beyond the formal spheres of ICL,⁶¹ it enables scholars to confront dissonances within the dominant ICL progress narrative of ending impunity. Such research is informed by anthropologically-oriented approaches that seek to understand the lived experiences of ICL. Particularly noteworthy here for their links with TWAIL sensibilities are the

⁵⁵ Ibid 413.

⁵⁶ See H. Charlesworth, ‘Feminist Methods in International Law’ (1999) 93 *AJIL* 379.

⁵⁷ For example, see F. N. Aolain, ‘Gendered Harms and their Interface with International Criminal Law’, 16 *International Feminist Journal of Politics* (2014) 622; J. Halley, ‘Rape in Berlin: Reconsidering the Criminalisation of Rape in the International Law of Armed Conflict’, 9 *Melbourne Journal of International Law* (2008) 78; and C. MacKinnon, ‘The ICTR’s Legacy on Sexual Violence’, 14 *New England Journal of International and Comparative Law* (2007-2008) 211.

⁵⁸ For an assessment of the Preventing Sexual Violence Initiative of 2012, see P. Kirby, ‘Ending sexual violence in conflict: the Preventing Sexual Violence Initiative and its critics’, 91 *International Affairs* (2015) 457-472.

⁵⁹ K. Engle, ‘Feminism and its (Dis)contents: Criminalizing Wartime Rape’, 99 *American Journal of International Law* (2005) 778, at 815. Also see Buss, *supra* note 54, at 415.

⁶⁰ Engle, *supra* note 59 at 816.

⁶¹ Nouwen, *As you set out for Ithaka*, *supra* note 38.

contributions of Kamari Clarke, Sara Kendall, Sarah Nouwen, Immi Tallgren and Richard Wilson⁶² through their efforts at problematizing the ICL project, especially as it plays out in the Global South. Of course, an array of research touching on ICL concerns is undertaken in a number of disciplines, yet my concern here is with the extent to which legally trained researchers engage with such methods and seek to share them with ICL audiences whether in the *Journal of International Criminal Justice* or the methodologically more diverse *International Criminal Law Review*.

4. Towards a TWAIL Transdisciplinarity for ICL? Appraising

Methodological Harmonies and Dissonances between ICL and TWAIL

TWAIL is a scholarly movement animated by a strong normative purpose: ending the subjugation of Third World peoples through an emancipatory approach to International Law. As in the case of feminist legal scholars, the TWAIL scholar sees herself as part of an intellectual movement that is simultaneously political and so she tends to be open about her theoretical and methodological underpinnings.⁶³ This is partly as a way of constructing an agenda for action: researchers can lay out scholarly strategies through which to advance their stated cause of Third World resistance to ongoing forms of subjugation and poverty. Despite often sustained discussion on the centrality of methodology for TWAIL, this does not equate with a shared approach to the study of international law.⁶⁴ As in the case of ICL, at best we can identify general trends and sensibilities within the TWAIL movement.

⁶² See for example, all of the articles in the 2015 ‘Global Justice Symposium of this Journal; Clarke, *supra* note 38; S. Kendall, ‘Donors Justice: Recasting International Criminal Accountability’, 24 *Leiden Journal of International Law* (2011) 585; S. Kendall and S. Nouwen, ‘Representational Practices at the International Criminal Court: The Gap between Juridified and Abstract Victimhood’, 76 *Law and Contemporary Problems* (2013) 235; Nouwen, *supra* note 29; I. Tallgren, ‘We Did It? The Vertigo of Law and Everyday Life at the Diplomatic Conference on the Establishment of the International Criminal Court’, 12 *Leiden Journal of International Law* (1998) 683; Tallgren, *Sensibility of International Criminal Law*, *supra* note 46; R. A. Wilson, *Writing History in International Criminal Trials* (Cambridge University Press, 2011); R. A. Wilson, ‘Through the Lens of International Criminal Law: Comprehending the African Context of Crimes at the International Criminal Court’, 11 *Studies in Ethnicity and Nationalism* (2011) 106; R. A. Wilson, ‘Gangster’s Paradise? Framing Crime in Sub-Saharan Africa’, 4 *Humanity* (2013) 449.

⁶³ Anghie and Chimni, *supra* note 22; and B. S. Chimni, ‘Third World Approaches to International Law: A Manifesto’, 8 *International Community Law Review* (2006) 3, at 22.

⁶⁴ O. C. Okafor, ‘Critical Third World Approaches to International Law (TWAIL): Theory, Methodology, or Both?’, 10 *International Community Law Review* (2008) 371, at 375. Also see the foreword and article by John Reynolds and Sujith Xavier in this symposium.

Why then engage with TWAIL at all if it does not offer a systematic methodology for ICL? Here I suggest that acquainting ourselves with TWAIL's methodological approaches is the first step required for the ICL field to cultivate more intellectually open and rigorous discussions about the nature of ICL research in general. In addition, learning from TWAIL experiences highlights how ICL can benefit from a number of approaches and sensibilities within international law more generally.

As 'TWAIL is both a political and an intellectual movement...[it] therefore ... has multiple histories'⁶⁵ constructed particularly by contemporary TWAIL scholars making sense of the movement's origins. During the Cold War, a select group of international lawyers hailing from the Third World understood their role as facilitating the concomitant demise of imperialism and the self-determination of Third World peoples through international law. These anti-imperial efforts of Third World scholars and practitioners during the 1960s and 1970s have come to be referred to as 'TWAIL I' scholarship. For our purposes here in mapping TWAIL methodologies, it is more useful to focus on the methodological contributions of 'TWAIL II' scholars whose work began around the same time as the meteoric rise of ICL in the 1990s.⁶⁶ While ICL is a specialised regime of international law, its normative links with more robust forms of international executive rule in the Global South means that it has come to play a central role in hegemonic governance projects.⁶⁷ This is in spite of the fact that ICL scholars often see themselves as working against power in the name of humanity.⁶⁸ Although often hailing from elite Western institutions themselves, recent TWAIL writers tend to revel in striking counter-hegemonic poses against prevailing neo-liberal forms of governance in the Third World.⁶⁹ Unlike ICL with its ever-expansive moves within the fields of international law and governance, TWAIL scholarship emphasises marginality and 'alternative histories'⁷⁰ so as to disrupt

⁶⁵ A. F. Sunter, 'TWAIL as Naturalised Epistemological Inquiry', 20 *Canadian Journal of Law and Jurisprudence* (2007) 475, at 481. Also see M Mutua, 'What is TWAIL?', 94 *American Society of International Law Proceedings* (2000) 31, at 32.

⁶⁶ For an overview of the similarities and differences between TWAIL I and TWAIL II, see M. L. Burgis, *Boundaries of Discourse in the International Court of Justice: Mapping Arguments in Arab Territorial Disputes* (Brill, 2009), at 31-33.

⁶⁷ A. Orford, *International Authority and the Responsibility to Protect* (Cambridge: Cambridge University Press, 2011), at ch. 4.

⁶⁸ Simpson, *supra* note 11, at 171.

⁶⁹ On counter-hegemony, see B. Rajagopal, 'Counter-hegemonic International Law: Rethinking Human Rights and Development as Third World Strategy' 27 *Third World Quarterly* (2006) 767.

⁷⁰ P. Parmar, 'TWAIL: An Epistemological Inquiry', 10 *International Community Law Review* (2008) 363, at 367.

dominant approaches, whether in relation to ICL or any other area of public international law. The most obvious example of such a stance is the way in which TWAIL scholars stress the importance of continuing to use ‘Third World’ terminology, not for its analytical rigour, but for its political connotations of opposition and necessary resistance.⁷¹

Although TWAIL scholars will differ regarding their research emphases, theories and methodologies, we can at least identify TWAIL’s central goals. In fact, there are a number of explicit statements listing these aims, particularly by TWAIL II scholars who have sought to consolidate a TWAIL research agenda. For Makau Mutua,

TWAIL is driven by three basic, interrelated and purposeful objectives. The first is to understand, deconstruct, and unpack the uses of international law as a medium for the creation and perpetuation of a racialized hierarchy of international norms and institutions that subordinate non-Europeans to Europeans. Second, it seeks to construct and present an alternative normative legal edifice for international governance. Finally, TWAIL seeks through scholarship, policy, and politics to eradicate the conditions of underdevelopment in the Third World.⁷²

This statement encapsulates the central tension animating TWAIL scholarship – suspicion and faith in the possibility of transformation through international law.⁷³ Particularly through detailed historical reconsiderations of the international law discipline, TWAIL scholarship has sought to place ‘the dynamic of difference’ at the centre of international law research relating to the (colonial) past as well as its (neo-colonial) present.⁷⁴ Such accounts imbue a deep distrust in the promise of international law. Yet rather than adopting typical post-structuralist rejections of law, TWAIL scholars also tend to hold on to the possibility of ending the subjugation of Third World people(s).⁷⁵ Thus, although many TWAIL scholars invoke a discourse of

⁷¹ See K. Mickelson ‘Rhetoric and Rage: Third World Voices in International Legal Discourse’ 18 *Wisconsin International Law Journal* (1998) 353, at 360-362.

⁷² Mutua, *What is TWAIL*, *supra* note 65, at 31.

⁷³ D. P. Fidler, ‘Revolt Against or From Within the West? TWAIL, the Developing World, and the Future Direction of International Law’ 2 *Chinese Journal of International Law* (2003) 29; and M. Khosla, ‘The TWAIL Discourse: The Emergence of a New Phase’ 9 *International Community Law Review* (2007) 291, at 296.

⁷⁴ A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, 2005).

⁷⁵ Especially see J. Haskell, ‘TRAIL-ing TWAIL: Arguments and Blind Spots in Third World Approaches to International Law’, 27 *Canadian Journal of Law and Jurisprudence* (2014) 383.

‘resistance’ that conjures up revolutionary imagery, it is in fact reform through law that is the dominant project of both TWAIL I and TWAIL II.⁷⁶

As was the case for ICL above, TWAIL’s purpose co-constitutes the particular theories and methodologies used by its adherents. Across my own schematic survey of TWAIL texts, I discern four broad and interrelated methodologies which have much in common with critical strands within ICL scholarship surveyed above.⁷⁷ Indeed a question to raise here is about the extent to which a TWAIL approach to ICL would be distinct from other critical approaches to ICL, especially those under the ‘Critical Approaches to International Criminal Law’ umbrella.⁷⁸ What constitutes ‘TWAILING ICL’? First, let us note what a TWAIL methodology would entail: 1) inter-disciplinarity or transdisciplinarity with the related call to learn from other critical approaches within and beyond legal scholarship, including feminism, Critical Race Theory and international law ‘Newstream’ scholarship;⁷⁹ 2) a global historicisation of international law that places questions of subalternity at the centre of the discipline;⁸⁰ 3) quasi-sociological⁸¹ as well as anthropological approaches that seek to understand structures of global governance as well as every day experiences of international law for peoples of the Global South;⁸² 4) discourse analyses informed with a historical sensibility for the marginalised and a suspicion about universalising narratives, such as ICL’s purported aim of realising ‘global justice’ for ‘humanity’. If we compare these four strands to critical work being undertaken on ICL whether by legal or non-legal scholars, it is clear that there are more similarities than differences between the two approaches; indeed, often scholars identify as sitting across or within both camps.

⁷⁶ See L. Eslava and S. Pahuja, ‘Between Resistance and Reform: TWAIL and the Universality of International Law’, 3 *Trade, Law and Development* (2011) 103.

⁷⁷ Sunter notes three: indiscipline, historical methods and the use of ‘localized’ cultural evidence to challenge the universality of the theoretical underpinnings of international law.’ Sunter, *supra* note 65, at 488.

⁷⁸ In particular, see C. Schwöbel (ed.), *Critical Approaches to International Criminal Law: An Introduction* (Routledge, 2014); the 2015 ‘Global Justice’ symposium in this *Journal*; and as a reaction to this trend, see D. Jacobs, ‘Sitting on the Wall Looking in: Some Reflections on the Critique of International Criminal Law’, 28 *Leiden Journal of International Law* (2015) 1-11.

⁷⁹ See Mickelson on transdisciplinarity, *supra* note 71; on intellectual coalitions: Mutua, *What is TWAIL*, *supra* note 65, at 38. On the Newstream, see D. Cass, ‘Navigating the Newstream: Recent Critical Scholarship in International Law’, 65 *Nordic Journal of International Law* (1996) 341.

⁸⁰ On subalternity, see D. Otto, ‘Subalternity and International Law: The Problems of Global Community and the Incommensurability of Difference’, 5 *Social and Legal Studies* (1996) 337; and Mutua, *What is TWAIL*, *supra* note 65, at 37; and history, especially see Anghie, *supra* note 73.

⁸¹ Haskell, *supra* note 75, at 396.

⁸² Eslava and Pahuja, *supra* note 76; L. Eslava, ‘Istanbul vignettes: observing the everyday operation of international law’, 2 *London Review of International Law* (2014) 3.

Perhaps what TWAIL offers most for ICL is its keen political commitment to interrogating and potentially liberating the Global South from various forms of legalised oppression. Such a focus is invaluable in light of contemporary debates over ICJ's undue focus on the Global South, particularly, Africa.

How well TWAIL scholars have deployed these methodologies and whether they have been successful in doing more than critique is beyond the scope of this article.⁸³ Equipped with this overview of TWAIL sensibilities, we can at least apply and compare them with dominant ICL approaches below in this article's final section.

5. Juridifying Violence/Doing Violence to the Political⁸⁴

In sections three and four, we saw how despite very different agendas during and after the Cold War, both ICL and TWAIL scholars have rallied around the possibility of global transformation through law whether understood as ending impunity or effecting radical structural change. Both ICL and TWAIL are also broadly committed to limiting if not ending certain forms of violence altogether even if disagreements prevail over the *types* of violence to single out and resist juridically. With its emphasis on colonialism and its legacies, TWAIL is concerned with the everyday violence that results through neoliberal and neo-colonial forms of governance in the Global South whether realised as classic individual criminal harms or collective conditions such as poverty and racial inequality. Conversely, ICL's central concern is on forms of direct, extreme violence or crises that tend to occur during conflict and social collapse.⁸⁵ These ICL and TWAIL concerns are not necessarily mutually distinct as TWAIL scholars would seek to account for historical and continuing forms of inequality that often cause such conflicts to break out. It is these 'background' conditions of social collapse and conflict that impels TWAIL scholars to 'foreground' histories of oppression and marginality. ICJ interventions are overwhelmingly concentrated on examples of direct, extreme violence across the Global South, particularly in Africa.⁸⁶

⁸³ See E. Bikundo, 'Saving Humanity from Hell: International Criminal Law and Permanent Crisis', 44 *Netherlands Yearbook of International Law* (2013) 89, at 96.

⁸⁴ This subheading invokes the title of Nouwen and Werner's article, 'Doing Justice to the Political', *supra* note 35.

⁸⁵ This is the case for international law generally: H. Charlesworth, 'International Law: A Discipline in Crisis', 65 *Modern Law Review* (2002) 377.

⁸⁶ See Asad Kiyani's contribution in this symposium.

Given TWAIL's geo-strategic concerns, it is then disappointing that when mainstream ICL scholars consider African exceptionalism, they rarely acknowledge TWAIL methodologies which are well-placed to link colonial legacies with perceptions of selectivity and oversight of various structural concerns.⁸⁷

One of the reasons for this is divergent understandings about the nature of violence itself. A key requirement of ICL trials and thus the bulk of ICL scholarship is to juridify⁸⁸ and thus criminalize and usually individualise extremely messy and complex events.⁸⁹ This is particularly pronounced in the context of criminal trials with their rigorous evidence requirements. Although ICL jurisprudence and scholarship considers the context of violence, such accounts tend to focus on (Third World) 'indigenous cause[s] of violence (the illegitimate seizure of power by local overlords, the abusive projection of that power by "nationalists" or "tyrants", the torture and oppression of local populations, the delusions of these local populations and so on)'.⁹⁰ Narratives recognising other contextual factors, like colonialism, are suppressed. By framing the causes of Third World violence as indigenous, the justice/violence binary can then serve as a powerful rhetorical device in affirming the need for ICL deliverance in the Global South:

[t]oo often judges use history and a sense of an uncontrollable past, pacified only through the justice meted out by the Courts, as a rhetorical strategy. But that is a strategy which disempowers communities affected by violence and which can stigmatise rather than cleanse. Such a view of the past as illustrative of violence, lawlessness and "ungovernable passions", can perpetuate the sense of violence in certain peoples' histories as cyclical or natural.⁹¹

⁸⁷ For example for an article on ICL's African exceptionalism that devotes only a few sentences to TWAIL, see H. Van der Wilt, 'Universal Jurisdiction under Attack: An Assessment of African Misgivings towards International Criminal Justices as Administered by Western States', 9 *Journal of International Criminal Justice* (2011) 1043, at 1066. For a broader consideration of the ICC in Africa, see K. M. Clarke and S.-J. Koulen, 'The Legal Politics of the Article 16 *Decision*: The International Criminal Court, the UN Security Council and Ontologies of a Contemporary Compromise', 7 *African Journal of Legal Studies* (2014) 297.

⁸⁸ According to Buss, 'the shift to criminalisation is an unprecedented move towards a highly legalistic response to large-scale violence in which social context and inequality are difficult to visualise and repair.' Buss, *supra* note 54, at 419.

⁸⁹ Tallgren, *Sensibility of International Criminal Law*, *supra* note 47, at 593-594.

⁹⁰ Simpson, *supra* note 11, at 171.

⁹¹ D. Joyce, 'The Historical Function of International Criminal Trials: Re-thinking International Criminal Law', 73 *Nordic Journal of International Law* (2004) 461, at 464.

Out of this morass of political context,⁹² a turn to individual criminal responsibility in ICL trials and scholarship requires individual, linear narratives⁹³ that simplify and criminalise conflict.⁹⁴ In such accounts, the inevitable emphasis will be on understanding the link between (usually Third World) individuals and acts of extreme and direct violence,⁹⁵ rather than more elusive forms of structural or ‘slow’ violence that often contribute to the particular offences under scrutiny.⁹⁶

Where ICL scholars tend to see the trial as effecting *rupture* and repair, TWAIL scholars seek to highlight colonial *continuities* that have produced these episodes of violence.⁹⁷ For example, scholarship about ICC trials arising from the Democratic Republic of Congo (DRC) would stress the need for a deep appreciation of the DRC’s colonial history not simply as an artefact of the past, but as an ongoing aspect of the present and the future. In this way, a central element of TWAILing ICL requires not simply an awareness of (static) structure, but violence as an enfolding and unfolding process. This is best captured in Rob Nixon’s notion of ‘slow violence’ which he developed in response to Johan Galtung’s notion of ‘structural violence’.⁹⁸ For Rob Nixon,

In contrast to the static connotations of structural violence ... slow violence foreground[s] questions of time, movement, and change, however gradual. The explicitly temporal emphasis of slow violence allows us to keep front and centre the representational challenges and imaginative dilemmas posted not just by imperceptible violence but by imperceptible change whereby violence is decoupled from its original causes by the workings of time.

... Simply put, structural violence is a theory that entails rethinking different notions of causation and agency with respect to violent effects. Slow violence, by contrast, might well include forms of structural violence, but has a wider descriptive range in

⁹² M. Koskeniemi, ‘Between Impunity and Show Trials’, 6 *Max Planck Yearbook of United Nations Law* (2002) 1.

⁹³ Simpson, *supra* note 11.

⁹⁴ S. Dezalay, *supra* note 18.

⁹⁵ See M. Mutua, ‘Savages, Victims and Saviours: The Metaphor of Human Rights’, 42 *Harvard International Law Journal* (2001) 201.

⁹⁶ Drumbl, *supra* note 4, at 600.

⁹⁷ On this notion of justice as rupture, see J Balint et al., ‘Rethinking Transitional Justice, Redressing Indigenous Harm: A New Conceptual Approach’, 8 *International Journal of Transitional Justice* (2014) 194-216, at 200-201.

⁹⁸ For more recent considerations of structural violence, see P. Farmer, ‘On Suffering and Structural Violence: A View from Below’, 125 *Daedalus* (1996) 261; and P. Farmer, ‘An Anthropology of Structural Violence’, 45 *Current Anthropology* (2004) 305.

calling attention, not simply to questions of agency, but to broader, more complex descriptive categories of violence enacted slowly over time.⁹⁹

In applying this understanding to ICL, Sarah Nouwen suggests that

[it] is not to say that international criminal law *should* see slow violence; there are more ways to see the world than through the lens of international criminal law ... The problem, however, lies in the monopolizing tendencies of a fashionable topic: the foregrounding of international criminal justice backgrounds something else ... [and thus] blinds the world to slow violence and other injustices.¹⁰⁰

As discussed above, the (pre)dominance of ICL frameworks reliant on the violence/justice binary radically restricts how we see harm and its repair. A TWAIL sensibility to ICL would encourage scepticism and self-reflexivity when thinking about law vis-à-vis violence, whether in its slow or urgent manifestations.

6. Conclusion

This article has used the case of ICL's and TWAIL's lack of dialogue to reveal the many theoretical and methodological possibilities available through (re)newed scholarly conversations. Yet we have also seen that this process of engaging explicitly with such questions of methodology reveals the extent to which neither TWAIL nor ICL scholars can deliver on their stated and unstated goals. Ending atrocity and impunity or global racism and 'underdevelopment' are noble ends, but scholars of international law need to reflect more deeply on the institutional factors that have given rise to such scholarly agendas that often tend to remain immune from internal critique. Thus, this article is also a call for circumspection and modesty as a scholarly methodology not simply vis-à-vis ICL and TWAIL, but for the field of international law more broadly.

⁹⁹ R. Nixon, *Slow Violence and the Environmentalism of the Poor* (Harvard University Press, 2011), at 11.

¹⁰⁰ Nouwen, *As you set out for Ithaca*, *supra* note 38, at 255.